

## Update: Sexual Assault Benchbook

### CHAPTER 7

#### General Evidence

##### 7.6 Former Testimony of Unavailable Witness

Insert the following text after the May 2005 update to page 364:

In *People v Jones*, \_\_\_ Mich App \_\_\_, \_\_\_ (2006), the Court first affirmed that the admission of an unavailable witness's testimonial statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. Concurring with *United States v Cromer*, 389 F3d 662 (CA 6, 2004), the *Jones* Court determined that because the witness's unavailability was procured by the defendant's wrongdoing, the defendant forfeited his constitutional right to confront that witness. In *Jones*, the only eyewitness to a shooting identified the defendant as the shooter in a statement to police. However, the witness refused to testify at trial regarding defendant's involvement in the shooting. At a separate hearing regarding his refusal to testify, the witness stated "that he feared retribution if he testified, particularly because certain individuals were present in the courtroom." *Jones, supra* at \_\_\_. The trial court admitted the witness's statement to police into evidence under MRE 804(b)(6). The Court of Appeals rejected defendant's assertion that the prosecutor failed to establish that defendant "engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness," as required by MRE 804(b)(6). The Court of Appeals concluded that evidence that members of a gang to which defendant belonged threatened the witness satisfied the rule's requirements.

## CHAPTER 9

### Post-Conviction and Sentencing Matters

#### 9.5 Imposition of Sentence

##### B. Sentencing Guidelines

Insert the following text after the October 2003 update to page 455:

In the absence of any evidence that the defendant's criminal conduct on one occasion arose from his conduct on another occasion, when a defendant is sentenced for more than one conviction of first-degree criminal sexual conduct (CSC-1) and the penetrations forming the basis of each conviction occurred on different dates, those penetrations may not be counted when scoring OV 11 for any of the defendant's CSC-1 convictions. *People v Johnson*, \_\_\_ Mich \_\_\_, \_\_\_ (2006).